

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0016, State of New Hampshire v. Kenneth W. Alder, the court on February 13, 2006, issued the following order:

Following a jury trial, the defendant, Kenneth Alder, was convicted on three counts of assault and for resisting arrest. On appeal, he contends that the trial court erred in allowing the State to impeach him with a prior shoplifting conviction. We reverse and remand.

We review a trial court's decision to admit a prior conviction under an unsustainable exercise of discretion standard. Zola v. Kelley, 149 N.H. 648, 652 (2003). The sole issue raised by the defendant on appeal is that the trial court erred by failing to require the State to prove that the prior shoplifting conviction was with the benefit of counsel or that there was a waiver of counsel. The State argues that this issue has not been preserved for our review. In State v. Staples, 120 N.H. 278, 285-86 (1980), we stated that "even if no objection is made to the use of prior convictions either on the issue of credibility or in sentencing, the trial court should secure from the defendant himself a valid waiver of any claim that any prior conviction was obtained without counsel or a valid waiver of counsel." We therefore conclude that this issue is properly before us and having examined the record, find no evidence that the trial court secured such a waiver in this case. See State v. Robinson, 123 N.H. 532, 535-36 (1983); Super. Ct. R. 68 ("Evidence of a conviction under this rule will not be admissible unless there is introduced a certified record of the judgment of conviction indicating that the party or witness was represented by counsel at the time of conviction unless counsel was waived.")

New Hampshire Rule of Evidence 609 authorizes the admission of evidence that a witness has been convicted of certain types of crimes for the purpose of attacking the credibility of the witness. In this case, the defendant argued at trial that he did not know what he was doing and therefore did not possess the requisite mental state required for conviction. Although three police officers testified about the defendant's physical actions, the only direct evidence of his mental state was his own testimony. He testified that he had been taking certain medications but had stopped taking them at the time of the assaults and could not recall what happened. He also testified that he was angry when he found he had destroyed a two hundred fifty dollar television and a four hundred dollar stereo. Based on the record before us, we cannot say that the erroneous admission of the defendant's previous conviction was harmless. See State v. Littlefield, 152 N.H. 331, 350 (2005) (for State to prevail

on harmless error claim when evidence is solely circumstantial evidence must exclude all rational conclusions except guilt).

Reversed and remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox
Clerk